No. 83-1027

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

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BRIEF IN OPPOSITION OF RESPONDENT CRAIG R. PENDLETON, WARREN COUNTY ENGINEER

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QUESTIONS PRESENTED

A. Will The Supreme Court of The United States exercise jurisdiction to consider a case in which the sole federal question presented by petitioner was not raised, preserved, or passed upon by the state courts below?

B. Does the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to The United States Constitution require a state supreme court to retroactively apply that state's comparative negligence statute to a case before it in which the retroactivity of the statute was not urged by petitioner in either that court or the inferior state courts.

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Respondent Craig R. Pendleton, Warren County Engineer, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of The Supreme Court of Ohio in this case.

STATEMENT OF THE CASE

Petitioner was involved in an intersection collision between his motorcycle and a pickup truck on July 23, 1979 when he failed to stop for an existing, present stop sign and collided with a vehicle operated by one Robert P. Cornett (not a party to the suit) who was lawfully proceeding through the intersection. He filed an action against respondents alleging that some or all of them were responsible for maintaining the existing stop sign at the intersection, that foliage had been permitted to obscure the stop sign, and that respondents' omissions had created a nuisance for which they should be required to respond in damages. All respondents pleaded the defense of contributory negligence.

Each respondent filed a motion for summary judgment asserting, *inter alia*, that petitioner was contributorily negligent as a matter of law. While denying any negligence, petitioner resisted those assertions, but did not urge the court to apply Ohio's comparative negligence statute to the case. The trial court granted respondents' motions for summary judgment.

The cause was appealed to the intermediate appellate court and to the Supreme Court of Ohio. The appeals were grounded on the same issues and arguments that were presented to the trial court. Petitioner failed to assert the retroactive applicability of the comparative negligence statute on appeal. The intermediate appellate court affirmed, and the Supreme Court of Ohio declined to exercise jurisdiction.

While the cause was pending in the Supreme Court of Ohio, that court issued its opinion in *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983), holding that Ohio's comparative negligence statute, O.R.C. 2315.19, was to be

applied retroactively to negligence actions tried after its effective date of June 20, 1980.

REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner failed to raise a federal question in the state courts below.

The sole federal question presented in the petition concerns the purported failure of the state supreme court to retroactively apply the state's comparative negligence statute to this case when that court had previously determined that the statute should be so applied in a different case. It is contended that petitioner's rights to Equal Protection and Due Process were thereby violated.

Petitioner did not present this issue to the state supreme court either before it declined jurisdiction or by way of a motion for rehearing. This Court will not exercise jurisdiction over a case in which the sole federal question presented by petitioner was neither raised nor decided in the state court below. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969). Where the federal question asserted by petitioner was not unmistakably raised in the state court, a writ will not issue, *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 (1897), and the federal issue will be deemed waived. *Herndon* v. *Georgia*, 295 U. S. 441 (1935).

Petitioner's failure to raise the federal question presented to this Court in the courts below is fatal to petitioner's assertion of jurisdiction pursuant to 28 U. S. C. Section 1257 (3).

B. The decisions of the state courts and the record do not raise the Question Presented in the petition.

The question presented by the petition is predicated upon allegedly disparate treatment of similarly situated litigants by the Supreme Court of Ohio. Petitioner apparently contends that the result reached by the state court in this case differs from the result reached in reference to similarly situated litigants in the case of *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983). This is said to violate petitioner's rights to due process of law and equal protection.

An examination of petitioner's position in the state courts, however, clearly demonstrates that petitioner failed to assert the legal principle which served as the basis for the state courts holding in *Wilfong*, supra. In *Wilfong*, the Supreme Court of Ohio held that O.R.C. 2315.19, the comparative negligence statute, would be given retrospective application, and would be applied in cases tried after June 20, 1980, the statute's effective date. 6 Ohio St. 3d, at page 104.

In reversing the intermediate appellate courts, the *Wilfong* court noted that the courts below had rejected the plaintiff's arguments, "refusing to give retroactive application to R.C. 2315.19, the Comparative Negligence Act." 6 Ohio St. 3d, at page 101. It is apparent that the litigants in *Wilfong*, as distinguished from petitioner, vigorously asserted the issue of retrospective application of the statute in the state courts.

Neither the Due Process Clause nor the Equal Protection Clause require a court to treat a litigant who fails to assert an issue in the same way as one who does raise an issue. The state court's disparate treatment is based upon a rational distinction.

The sole federal issue presented by petitioner presupposes different treatment of similarly situated parties. This presupposition is contrary to the record. The petition presents a hypothetical question, and respondent respectfully requests the Court to deny the request for a writ of certiorari.

CONCLUSION

Respondent respectfully submits that the question presented by the petitioner was not raised, argued, or decided in the courts below and further submit that the record does not support the issue raised by petitioner. The writ should be denied.

Respectfully submitted,

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